

A **Lee Ewe Poh v Dr Lim Teik Man & Anor**

B HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22–170 OF 2007
CHEW SOO HO JC
2 SEPTEMBER 2010

C *Tort — Privacy, invasion of — Photographs of female private parts by her doctor —*
Whether invasion of privacy recognised cause of action in Malaysia — Breach of
trust or confidence — Whether first defendant liable to patient for breach of trust or
confidence — Whether taking of photographs in the course of surgical procedure —
Whether photographs could be taken without plaintiff's prior knowledge or consent
D *— Whether second defendant vicariously liable — Whether plaintiff entitled to*
aggravated and/or exemplary damages

E The plaintiff had consulted the first defendant, a colorectal surgeon, practising
in a specialist centre owned and operated by the second defendant. The
plaintiff who was suffering from haemorrhoids or piles was admitted and
successfully treated by a procedure performed by the first defendant. Thereafter
the plaintiff learned from a nurse that the first defendant had taken
photographs of her private parts during the procedure. The plaintiff
commenced an action against the defendants claiming a violation of her
F privacy and/or dignity by the first defendant. The plaintiff claimed that the first
defendant was not entitled to take the two photographs showing her anus ('the
photographs') without her prior knowledge and consent. It was also the
plaintiff's case that the second defendant was vicariously liable for the acts of
G the first defendant. She prayed for an injunction to restrain the defendants
from publishing and disseminating the photographs, aggravated and/or
exemplary damages, interest and costs. The defendants submitted that a claim
on an infringement, invasion or violation of privacy was not a recognised tort
or a cause of action in Malaysia. The first defendant relied on medical literature
H to submit that it was acceptable medical practice for photographs to be taken in
the course of surgical procedure. The defendants also submitted that, as the
photographs were taken in a clinical environment and intended for the
plaintiff's medical record, there was no publication. Further, it was submitted
that the plaintiff's identity was not known in these photographs and that so
I long as the plaintiff's identity was protected, the confidence was not breached.
The plaintiff in reliance on the Court of Appeal case of *Maslinda bt Ishak v*
Mohd Tahir bin Osman & Ors [2009] 6 MLJ 826; [2009] 6 CLJ 653 (*Maslinda*
Ishak's case) contended that the Court of Appeal had recognised and affirmed
invasion of privacy as a cause of action. The plaintiff maintained that her prior

consent was an absolute requirement especially since the photographs involved images of her intimate parts.

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Held, allowing the plaintiff's claim with costs:

- (1) Although *Maslinda Ishak's* case is not directly on point, the fact remains that the Court of Appeal in that case had accepted the invasion of privacy of a female in relation to her modesty, decency and dignity to be a cause of action and thus actionable. In the circumstances, the plaintiff in the instant case ought to be allowed to maintain such a claim (see para 8).
- (2) Even if this court were to err to hold the view that invasion of privacy rights was actionable under our common law, the plaintiff could still come within the cause of action of breach of trust or confidence for having satisfied the three requirements for liability under this cause of action in tort. The first requirement that the information must have the necessary quality of confidence could be reasonably inferred from the fact the fact that the photographs taken showed her intimate parts. The second requirement of obligation of confidence on the part of the doctor had also been satisfied, especially since the first defendant had taken the photographs while the plaintiff was under anesthesia, without her express consent. Although there was no direct evidence that there was an unauthorised use or disclosure of that information, which was the third requirement, it was the plaintiff's case that the nurse of the specialist centre had informed her of the photographs. When this confidential information was admitted by the first defendant doctor it became evidence of the fact that there must have been disclosure or publication of that information, and the evidence was no longer hearsay (see para 9).
- (3) Although the first defendant had submitted that it was acceptable medical practice for photographs to be taken in the course of surgical procedure, a distinction must be drawn when taking photographs of the parts of the female's body which may expose her modesty. The prior consent of the female patient becomes an absolute requirement when it involves such photographs. The first defendant as a colorectal surgeon ought to be aware of the need to obtain the patient's prior consent for such photographs to be taken, which was recommended in the article published in the medical journal he relied on. Further, the taking of the photographs was not mandatory or compulsory but only discretionary. Since the patient's consent for the conduct of the procedure had to be obtained before the procedure was performed, there was no valid reason why her consent could not be similarly obtained for the photographs to be taken. It was thus found that the first defendant had to obtain the plaintiff's prior consent before photographs were taken of her intimate

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- A parts and if they were taken without her consent they ought to be surrendered or destroyed as agreed by her, which was not done in the instant case (see para 13).
- (4) The second defendant was vicariously liable for the acts of the first defendant (see para 16).
- B (5) In the present case the acts were not calculated to injure the feelings of the plaintiff. Thus there was insufficient evidence to justify aggravated damages to be awarded. Neither did the instant case fall within any of the three categories for the award of exemplary damages (see paras 18–19).
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[Bahasa Malaysia summary]

- D Plaintiff telah berunding dengan defendan pertama, seorang pakar bedah kolorektum, beramal di pusat pakar yang dimiliki dan diuruskan defendan kedua. Plaintiff yang mengalami hemoroid atau buasir dimasukkan wad dan telah berjaya dirawat menerusi suatu prosedur yang dijalankan defendan pertama. Kemudiannya, plaintiff mengetahui daripada seorang jururawat bahawa defendan pertama telah mengambil gambar-gambar bahagian sulitnya semasa prosedur tersebut. Plaintiff memulakan tindakan terhadap defendan pertama mendakwa pencabulan privasinya dan/atau kehormatannya oleh defendan pertama. Plaintiff mendakwa bahawa defendan pertama tidak berhak mengambil dua gambar duburnya ('gambar-gambar tersebut') tanpa pengetahuan dan keizinannya. Juga menjadi kes plaintiff bahawa defendan kedua bertanggungjawab secara vikarius ke atas tindakan-tindakan defendan pertama. Dia memohon suatu injunksi menghalang defendan-defendan menerbitkan dan mengedarkan gambar-gambar tersebut, ganti rugi teruk dan/atau teladan, faedah dan kos. Defendan-defendan menghujah bahawa tuntutan pelanggaran atau pencabulan privasi bukanlah tort yang diiktiraf atau kausa tindakan di Malaysia. Defendan pertama merujuk kepada kepustakaan perubatan untuk menyatakan bahawa ia merupakan amalan perubatan yang diterima bagi gambar-gambar diambil dalam keadaan klinikal dan bertujuan untuk rekod perubatan plaintiff, dan juga tiada penerbitan berlaku. Selanjutnya, dihujahkan bahawa identiti plaintiff tidak diketahui dalam gambar-gambar tersebut dan selagi identiti plaintiff terjaga, kepercayaan tidak dimungkiri. Bergantung kepada kes Mahkamah Rayuan *Maslinda bt Ishak v Mohd Tahir bin Osman & Ors* [2009] 6 MLJ 826; [2009] 6 CLJ 653 ('kes *Maslinda Ishak*'), plaintiff berhujah bahawa Mahkamah Rayuan mengiktiraf dan mengesahkan pelanggaran privasi sebagai kausa tindakan. Plaintiff menegaskan bahawa keizinannya merupakan keperluan mutlak terutamanya apabila gambar-gambar tersebut menunjukkan bahagian sulitnya.
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Diputuskan, membenarkan tuntutan plaintiff dengan kos:

- (1) Walaupun kes *Maslinda Ishak* tidak secara langsung bersangkut-paut, faktanya adalah Mahkamah Rayuan dalam kes tersebut telah menerima

pelanggaran privasi seorang perempuan berkaitan kehormatan, kesopanan dan maruah menjadi kausa tindakan dan oleh itu boleh diambil tindakan. Dalam keadaan ini, plaintif dalam keadaan ini harus dibenarkan mengekalkan tuntutan tersebut (lihat perenggan 8).

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- (2) Walaupun jika mahkamah ini khilaf atau berpendapat bahawa pelanggaran kepada hak privasi boleh diambil tindakan di bawah *common law*, plaintif masih lagi boleh mengambil tindakan di bawah pecah amanah atau kepercayaan setelah memenuhi tiga keperluan untuk liabiliti di bawah kausa tindakan dalam tort. Keperluan pertama ialah bahawa maklumat tersebut mestilah mempunyai kualiti kepercayaan yang boleh disimpulkan sewajarnya daripada fakta bahawa gambar-gambar tersebut menunjukkan bahagian sulit plaintif. Keperluan kedua iaitu tanggungjawab kepercayaan di pihak doktor juga telah dipenuhi, terutamanya apabila defendan pertama telah mengambil gambar-gambar semasa plaintif hilang kesedaran akibat dibius, tanpa menyatakan keizinannya. Walaupun tiada keterangan jelas bahawa tiada penggunaan atau pendedahan maklumat tersebut tanpa kebenaran, yang mana merupakan keperluan ketiga, adalah menjadi kes plaintif bahawa jururawat pusat pakar tersebut telah memberitahunya berkenaan gambar-gambar tersebut. Apabila maklumat sulit ini diakui oleh defendan pertama, adalah menjadi keterangan fakta bahawa tentunya berlaku pendedahan atau penerbitan maklumat tersebut, dan keterangan tersebut bukan lagi keterangan dengar cakap (lihat perenggan 9).

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- (3) Walaupun defendan pertama berhujah bahawa ia merupakan amalan perubatan yang telah diterima bagi gambar-gambar diambil semasa prosedur pembedahan dilakukan, perbezaan harus dibuat apabila mengambil gambar-gambar bahagian badan perempuan yang mungkin mendedahkan kesopannya. Keizinan pesakit perempuan menjadi keperluan mutlak apabila melibatkan gambar-gambar sebegitu. Defendan pertama, sebagai pakar bedah kolorektum harus sedia maklum tentang perlunya mendapat keizinan pesakit bagi gambar-gambar sebegitu diambil, yang mana disarankan dalam artikel yang diterbitkan dalam jurnal perubatan yang dirujuknya. Selanjutnya, pengambilan gambar-gambar bukanlah mandatori atau diwajibkan malah hanyalah budi bicara. Memandangkan keizinan pesakit ke atas pengendalian prosedur tersebut harus diperolehi sebelum prosedur dilaksanakan, tiada sebab yang sah mengapa keizinannya tidak diperolehi bagi gambar-gambar tersebut diambil. Oleh itu, diputuskan bahawa defendan pertama mestilah mendapatkan keizinan plaintif sebelum mengambil gambar-gambar bahagian sulitnya dan jika diambil tanpa keizinannya, gambar-gambar tersebut harus diserahkan atau dimusnahkan, seperti yang dipersetujuinya, yang mana tidak dilakukan dalam kes ini (lihat perenggan 13).

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- A (4) Defendan kedua secara vikariusnya bertanggung ke atas tindakan-tindakan defendan pertama (lihat perenggan 16).
- (5) Dalam kes ini, tindakan-tindakan tersebut tidak menjejaskan perasaan plaintif. Maka, tiada keterangan mencukupi untuk mewajarkan ganti rugi teruk diberikan. Begitu juga kes ini tidak terangkum dalam mana-mana tiga kategori bagi award ganti rugi teladan (lihat perenggan 18–19).]
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Notes

- C For cases on tort in general, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1–1820.

Cases referred to

- Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352; [1994] 1 CLJ 19, HC (refd)
- D *Foo Fia Na v Dr Soo Fook Mun & Anor* [2007] 1 MLJ 593, FC (refd)
- Lew Cher Phow @ Lew Cha Paw & 11 Ors v Pua Yong Yong & Anor* (unreported, Johor Bahru High Court Civil Suit No MT 4–22–510 of 2007) (refd)
- Maslinda bt Ishak v Mohd Tahir bin Osman & Ors* [2009] 6 MLJ 826; [2009] 6 CLJ 653, CA (refd)
- E *Murray v Yorkshire Fund Managers Ltd* [1998] 1 WLR 951, CA (refd)
- Regina v Department of Health Ex parte Source Informatics Ltd* [2001] QB 424, CA (refd)
- Rookes v Barnard and others* [1964] AC 1129, HL (refd)
- F *Rowlands v Chief Constable of Merseyside* [2007] 1 WLR 1065, CA (refd)
- Saltman Engineering Co, Ltd and others v Campbell Engineering Co, Ltd* (1948) 65 RPC 203, CA (refd)
- Tan Kau Tiah @ Tan Ching Hai v Tetuan Teh Kim Teh, Salina & Co (a firm) & Anor* [2010] 3 MLJ 569, CA (refd)
- G *Ultra Dimension Sdn Bhd v Kook Wei Kuan* [2004] 5 CLJ 285, HC (refd)

Legislation referred to

Civil Law Act 1956 s 3

- H *Simon Murali (Lio & Partners) for the plaintiff.*
Sagadevan Thangavelu (Nurul Huda bt Mansor with him) (Shearn Dealmore & Co) for the first defendant.
Ramsun Ho (See Ramsun & Tan) for the second defendant.

Chew Soo Ho JC:

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[1] The plaintiff, a freelance writer was suffering from haemorrhoids or piles and had on 20 December 2006 consulted the first defendant who is a general and colorectal surgeon practising in Loh Guan Lye Specialist Centre (the

specialist centre') owned and operated by the second defendant. The plaintiff was admitted to the specialist centre and a procedure known as stapler haemorrhoidectomy was performed by the first defendant with the result that the plaintiff's haemorrhoids were successfully removed. She was discharged on 22 December 2006. On 27 December 2006, when the plaintiff called the specialist centre to inquire about what had exactly happened during the procedure, she was shocked to learn from the nurse that the first defendant had taken photographs of her private part during the procedure. The plaintiff was outraged as photography was not in the agenda of the procedure and she was not duly informed. She claimed a violation of privacy and/or dignity by the first defendant since she was never asked for and she did not give her consent for the first defendant to photograph her privacy when she was under anaesthesia. She prayed for an injunction to restrain the defendants from publishing, disseminating etc of the said photographs taken by the first defendant, damages, interest and costs.

[2] The first defendant admitted that he had taken two photographs of the anus of the plaintiff while she was under sedation ie one photograph before the stapler haemorrhoidectomy and one after the said procedure. He contended that what he did was in accordance with accepted medical practice and he did not disseminate the two photographs but kept them as his medical records to facilitate easy explanation to the patient after the performance of the aforesaid procedure.

THE ISSUES

[3] From the submissions of all parties in this case, the issues raised that called for determination can be deduced as follows:

- (a) whether the plaintiff's cause of action for violation or invasion of privacy rights is actionable under the law of tort;
- (b) whether it is an acceptable medical practice for photographs to be taken in the course of surgical procedure and whether the first defendant is entitled to take the two photographs showing the anus of the plaintiff without her prior knowledge and consent; and
- (c) whether the plaintiff is entitled to aggravated and/or exemplary damages in the event her claim is allowed.

EVALUATION AND FINDINGS

First issue: Whether the plaintiff's cause of action for violation or invasion of her privacy rights is actionable under the law of tort

[4] There is no dispute that the plaintiff and the first defendant had a

- A doctor-patient relationship. Indeed, the duty of care owned by a doctor arises out of his relationship with his patient. Without the doctor and patient relationship, there is no duty on the part of the doctor to diagnose, advise and treat his patient; see *Foo Fia Na v Dr Soo Fook Mun & Anor* [2007] 1 MLJ 593 at p 601. The first defendant contended that invasion of privacy rights is not a recognised breach in tort under the English common law and hence it is also not an actionable tort in Malaysia pursuant to s 3 of the Civil Law Act 1956. Learned counsel for the first defendant refers to *Clerk & Lindsell on Torts* (18 Ed, 2000) p 19 para 1-34 which says that 'privacy remains an interest unprotected by the English law of torts. However gross the invasion of the claimant's privacy, that violation of privacy is not itself a tort ... It would not be overlooked that violation of privacy can amount to violation of some other interest protected in tort. This may range from trespass to land to injury to health resulting repeated incursions of privacy or breach of confidence ...'
- B Therefore learned counsel for the first defendant submitted that the plaintiff must establish that there was a breach of confidence or trust by the first defendant resulting in the invasion of the plaintiff's privacy rights. To be able to succeed in such claim, three requirements must be satisfied ie the information must have the necessary quality of confidence about it, the information must have been imparted in circumstances importing an obligation of confidence and there must be an unauthorised use or disclosure of that information. He cited in support *Clerk & Lindsell on Torts* at p 1518 para 27-03 and *Murray v Yorkshire Fund Managers Ltd* [1998] 1 WLR 951. It was also submitted that so long as the confider's identity is protected, the confidence is not breached referring to *Regina v Department of Health Ex parte Source Informatics Ltd* [2001] QB 424 at p 440 and *Medical Negligence* by Michael A Jones, 2003, p 173 at para 2-169. Since there is no evidence that the first defendant had disseminated the two photographs to any third parties or that he had made unauthorised use of the said photographs, learned counsel for the first defendant submitted that the first defendant was not in breach of any confidence or trust. It was further submitted that the first defendant being the treating doctor who had already seen the plaintiff's private part whilst undertaking the procedure cannot be said to have violated the plaintiff's privacy and that the moment the plaintiff had submitted herself to the first defendant to conduct the procedure, there is no longer any right of privacy available to the plaintiff.
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- I [5] Learned counsel for the second defendant similarly submitted that a claim on an infringement, invasion or violation of privacy is not a recognised tort or a course of action in Malaysia citing the case of *Ultra Dimension Sdn Bhd v Kook Wei Kuan* [2004] 5 CLJ 285 and *Lew Cher Phow @ Lew Cha Paw & 11 Ors v Pua Yong Yong & Anor* (unreported, Johor Bahru High Court Civil Suit No MT 4-22-510 of 2007). It was contended that the photographs taken were

taken in a clinical environment and intended for the plaintiff's medical record; there was no publication. The plaintiff's identity was also not known in these paragraphs.

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[6] The plaintiff's counsel submitted on the other hand that the old school of thought does not recognise the invasion of privacy as an actionable tort. He relied however on our Court of Appeal's case of *Maslinda bt Ishak v Mohd Tahir bin Osman & Ors* [2009] 6 MLJ 826; [2009] 6 CLJ 653 to contend that our Court of Appeal has recognised and affirmed invasion of privacy as a cause of action.

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[7] In *Maslinda Ishak's* case, His Lordship Suriyadi Halim Omar JCA, in delivering the judgment of the Court of Appeal has said at pp 831–832 (MLJ); p 657 (CLJ) as follows:

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[4] It was pleaded that at about 11.30pm on 21 March 2003 the appellant was arrested at the Kelab De Vegas at Jalan Imbi, Kuala Lumpur in a joint operation by officers of the second and third respondents. The appellant together with some other persons arrested, were then put into a truck and driven off to Taman Maluri, Cheras. Enroute the appellant had requested from officers of the second and third respondents permission to use the toilet facilities but was disallowed. Instead she was scolded and told to urinate in the truck. As she was in quite a state, she asked her friends to shield her by encircling her with a shawl, in order to ease herself. At that particular moment, the first defendant suddenly opened the door of the truck, rushed in, pulled down the shawl and proceeded to take numerous photos of the appellant in a squatting position urinating. As a result, the appellant was thoroughly humiliated with the whole incident, which was within the view of everyone in the truck.

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[5] There was abundance of evidence as regards this invasion of privacy, amongst others, his subsequent prosecution for a charge under s 509 of the Penal Code under Arrest Case C83–494 of 2003. He pleaded guilty and was convicted of it. He was accordingly sentenced to four months jail vide, with the sentence confirmed by the High Court vide a revision. In fact, this issue of the invasion of privacy was never under challenge.

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[6] To return to the pleadings, the appellant pleaded that her privacy had been invaded, resulting in her humiliation, trauma and serious mental anguish. She wanted general, aggravated and exemplary damages in the sum of RM5,000,000 interest and costs from the first defendant and the respondents. She pleaded that the officers of the second and third respondents at the material time, had negligently failed to protect her wellbeing, by allowing the first defendant to snap those photographs. To reiterate, at the end of the trial, the learned judge found for the appellant only as regards the first defendant, but not the rest of the respondents. Neither did the first defendant nor the respondents appeal against that decision.

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- A [8] The learned trial judge found for Maslinda Ishak against the first defendant but not against the other respondents for whom she appealed. The Court of Appeal allowed her appeal and held the respondents to be jointly and severally liable for the wrongful act of their agent as well as vicariously liable. Although *Maslinda Ishak's* case is not directly on point, the fact remains that
- B the High Court in so finding has departed from the old English law that invasion of privacy is not an actionable tort and our Court of Appeal indirectly, though this issue was not canvassed, seems to endorse such cause of action when the pleadings were specifically referred to and the Court of Appeal did not overrule invasion of privacy as a cause of action on ground that it is not one
- C in line with the English law. Since such a cause of action has been accepted as a cause of action under our common law, it is thus permissible for a plaintiff to found his/her action on it. Drawing an analogy of this Court of Appeal case, I am inclined to hold the view that since our courts especially the Court of Appeal have accepted such an act to be a cause of action, it is thus actionable.
- D The privacy right of a female in relation to her modesty, decency and dignity in the context of the high moral value existing in our society is her fundamental right in sustaining that high morality that is demanded of her and it ought to be entrenched. Hence, it is just right that our law should be sensitive to such rights. In the circumstances, the plaintiff in the instant case ought to be allowed
- E to maintain such claim.

- [9] On the first defendant's submission of the cause of action for breach of confidence or trust which is the available cause of action in tort which the plaintiff could proceed on provided that the three requirements for liability as
- F stated in para 27-02 at p 1518 in *Clerk & Lindsell on Torts* which has been cited above are satisfied, I shall consider these requirements in the light of the evidence in this case. On the first requirement that the information must have the necessary quality of confidence about it (per Lord Greene MR in *Saltman Engineering Co, Ltd and others v Campbell Engineering Co, Ltd* (1948) 65 RPC
- G 203 at p 215), I find that the photographs taken showing the intimate part of the plaintiff's anatomy being her private part and/or anus ought to be reasonably inferred as information having the necessary quality of confidence as it involves the modesty, decency and dignity of a woman. The quality of confidence can be easily and reasonably inferred. Secondly, when the first
- H defendant took the photographs in circumstances when the plaintiff was under anaesthesia, the first defendant was under an obligation to maintain confidence of that information on the general duty of the doctor arising from the doctor-patient relationship that no information of a patient's medical information is to be disclosed without the express consent of the patient. The
- I doctor is certainly obligated and duty bound to maintain strict confidence of those photographs or information which he had acquired in circumstances where he had not obtained the consent of the patient. I find this second requirement of obligation of confidence on the part of the doctor to have been satisfied. Thirdly, there must be an unauthorised use or disclosure of that

information. There is no doubt that there is no direct evidence of the dissemination of the photographs taken of the plaintiff by the first defendant. However, evidence of the plaintiff showed that it was upon contacting the hospital and speaking to the nurse that she was told that the photographs of her private part and/or anus were taken during the procedure when she was under anaesthesia. This information provided to the plaintiff at first glance would seem to be hearsay evidence without the nurse being called as a witness. However, when the plaintiff confronted the first defendant with what she was told by the nurse, the fact that first defendant had taken photographs of the anus of the plaintiff as narrated by the nurse was confirmed. Thus, what the plaintiff had been told by the nurse of the hospital becomes a fact upon the admission by the first defendant and such evidence is therefore no longer hearsay. When the nurse of the hospital was able to know of the confidential information ie the photographs taken showing the private part and/or anus of the plaintiff, in the absence of any evidence of rebuttal or to the contrary, the reasonable inference is that there must have been disclosure or publication of that information. In the circumstances, I find that even if this court were to err to hold the view that invasion of privacy rights is actionable under our common law, the plaintiff can still come within the cause of action of breach of trust or confidence for having satisfied the three requirements for liability under this cause of action in tort.

Second issue: Whether it is an acceptable medical practice for photographs to be taken in the course of surgical procedure and whether the first defendant is entitled to take the two photographs showing the anus of the plaintiff without her prior knowledge and consent

[10] The first defendant had produced the memory card of his digital camera which he used to take two photographs showing the anus of the plaintiff ie one taken before the procedure and one after. The two photographs were shown to the court and all counsel during this trial using the digital camera of the first defendant. All other contents in the said memory card were deleted by the first defendant leaving only these two images showing the anus of the plaintiff. Hence the admitted fact is that first defendant had taken two photographs of the anus of the plaintiff. The first defendant's contention is that it is an acceptable practice for doctors or surgeons to take photographs during procedure as it would be useful to explain the procedure and outcome to the patient. In other words photographs will facilitate surgeon's explanation of the procedure and its result with ease. The first defendant contended that the taking of photographs during the course of the procedure without the consent of the patient is an acceptable practice relying on the evidence of Dr Akhtar Qureshi (DW3), a consultant general and colorectal surgeon practising at Sunway Medical Centre, Petaling Jaya, and medical literature titled *Clinicians taking pictures — a survey of current practice in emergency departments and*

A *proposed recommendations of best practice* by P Bhangoo, IK Maconochie, N Batrick, E Henry (exh D4) published in the *Emergency Medical Journal* 2005; 22:761–765. It is worthwhile to reproduce p 763 of the said *Emergency Medical Journal* on the issue of ‘consent’ which states:

B 1. Consent

C Image taken for clinical purposes form part of patient’s health record. Consent to x rays and ultrasound investigations are given implicitly by the patient undergoing those procedures. Similarly, by presenting for treatment and investigation, the patient enters into a tacit agreement to documentation, which includes images as well as written information.

D An image taken for the purpose of treating a patient must not be used for any other purpose without express consent. However, if such an image is subsequently to be published, or used for educational research, written consent must be sought for that specific purpose. Consent is not required when the image taken for treatment or assessment does not allow the patient to be recognized; in this case, the image can be used for educational or research purposes, with the caveat that ‘express consent must be sought for any form of publication’. When making a judgment about whether the patient may be identifiable, one should bear in mind that apparently insignificant features may still be capable of identifying the patient to others. As it is difficult to be absolutely certain that a patient will not be identifiable, clinical photographs should not be published or used in any form to which the public may have access without the consent of the patient.

F If the patient is unable to give consent when the image is taken — for example, he or she is unconscious — then the image cannot be used until the patient has the capacity to give consent. Permission may be given by the immediate family if the patient is likely to be permanently incapacitated. Young people aged 16 years or over are assumed to be competent to give consent; under this age, Gillick competency (the level of competence of an individual in decision making referred to in *Gillick v Norfolk & Wisbech Area Health Authority*) to give consent may have to be determined.

G It must be explained when obtaining consent that once the image is in the public domain, it is difficult to control its future use and it may not be possible to withdraw the image. Latest General Medical Council guidelines, published in April 2004, detail all aspects of patient confidentiality and consent procedures.

H [11] From the above extract, I presume the first defendant is relying on the sentence that ‘Consent is not required when the image taken for treatment or assessment does not allow the patient to be recognized’. Nevertheless, there is expressed caveat that ‘express consent must be sought for any form of publication’ and if the patient is unable to give consent when the image is taken — for example, he or she is unconscious — then the image cannot be used until the patient has the capacity to give consent.’ Consent is indeed significant and

it is so reflected by the learned authors in the same article when they made the recommendations at p 764, which the first defendant seems to ignore whether deliberately or otherwise, as follows:

Consent procedures should be followed by those involved with obtaining clinical images, as this will protect the clinician and patient from misuse or misunderstanding about the intended use of the image.

Although consent is not required for an anonymized image to be used for educational purposes it is common courtesy to explain how the image will be used, particularly as it may come into the public domain.

Although the image that is solely to be used for treatment/clinical purposes does not require written consent, the existence of a written statement for consent stating the use of the material would help protect the patient and clinician in the event of litigation.

Ideally written consent should include:

- (1) An explanation of the need for and purpose of such documentation.
- (2) That the images will form part of their confidential health records.
- (3) These images may be used for research or educational purposes, or both.
- (4) The name and signature of the medical practitioner and consultant.

If consent for clinical purposes only has been given then it must be clearly recorded as such.

[12] Quite vividly, from the recommendation of the learned authors, written consent is preferred in relation to obtaining of clinical images. Even for an anonymised image to be used for educational purposes, the clinician will still have to explain to the patient how the image will be used. The recommendation above expresses that written consent is to be obtained ideally in particular that the written consent should include an explanation of the need for and purpose of such documentation, or that the images will form part of their confidential health records which are relevant in the present case. The learned authors indeed indirectly endorsed the fact that the old practice is not proper and recommended the change to have written consent when images of patient are to be taken by clinicians. There is certainly no question of tacit consent being recommended to avert written consent being obtained in advance from the patient before images are taken. Basically, the tacit consent referred to in the said article is in relation to images such as x-ray and/or ultrasound which are kept by clinicians for documentation. Dr Mohamed Akhtar bin Mohamed Ditali Qureshi ('DW2'), a consultant general and colorectal surgeon, the expert witness called by the first defendant stated that for the procedure of stapler haemorrhoidectomy, the exposure of the patient of her anus must include the vagina. This is to allow access to the posterior wall of the vagina to ensure that the vagina vault is not included in the closed stapling

- A device. He gave his view that photographs are frequently taken by surgeons and physicians during surgery and endoscopy and these photographs form part of the medical record. He added that it is an acceptable practice to take such photographs pre and post-surgery as they are useful to explain the procedure and outcome to the patient. Nevertheless, in cross-examination, DW2 agrees
- B that whether photographs are to be taken or not the right is vested solely on the patient and patient must be informed in advance of the possibility of photographs having to be taken during the surgery. However, he disagrees that it is the duty of the surgeon to get the patient's consent before he takes the photographs as there was no guideline nor written law governing this photo
- C taking. In re-examination he said that when patient is conscious when photo is to be taken, patient's consent is asked. When questioned by this court DW2 agrees that it is proper for consent to be obtained from female patient when images are to be taken of the intimate part of her anatomy.
- D [13] Having evaluated all evidence before this court, I find no doubt that in order for the surgeon to take photographs of a female patient's intimate parts of her anatomy as in this case, the proper procedure to adopt is to obtain her prior consent whether it is written or oral. This is in line with the recommendation as expressed in the article in the *Medical Journal* as cited by the first defendant
- E who elects to ignore such recommendation. Even defence's expert witness DW2 agrees that it is only proper to obtain patient's consent in order to take photographs of the intimate part of the patient's anatomy, particularly, a female patient. Consent is thus not to be construed as an illusion or a formality but an absolute requirement when it involves images of the intimate parts of a female
- F patient. I am of the view that medical practitioners ought to be sensitive to female patients in our country where their morality, religious value, decency, modesty and dignity are still considered high that any photograph of their intimate parts of their anatomy should have their prior consent before images of them are taken before, during or after the surgery. In the present advance
- G technology any information could have come to public dormain if there is no proper security or safeguard to protect such information from misuse. The fear of the plaintiff in the instant case that her images showing her anus and/or private part taken without her knowledge as she was under anaesthesia and without her consent could have reached the public dormain is not unfounded
- H but tangible. Defence has contended that no consent is required for photo images to be taken during the procedure as it is the accepted practice. I am, however, of the view that a distinction must be drawn when taking photographs of the parts of the female's body which may expose her modesty and dignity as compared to photographs merely showing her hands or feet
- I which if exposed would not cast any repercussion on her morality, decency, modesty, respect or others and might not have caused such degradation. Such accepted practice, if it is bad, ought to be changed to reflect the sensitivity of the female patients and to avert the vulnerability of misuse of such images showing the inner parts of a female's anatomy. DW3 who had been practising

medicine in United Kingdom and Malaysia sees the distinction between the female patients in United Kingdom and in Malaysia as regards their sensitivity over images of their anatomy. He candidly admitted that prior consent is necessary from female patients in Malaysia before photographs of the intimate parts of their anatomy are to be taken. The first defendant has been an experienced general and colorectal surgeon and ought to be well aware of the need to obtain the plaintiff's prior consent for such photographs to be taken. If only he had followed the recommendation in the article as published in the *Medical Journey* which he relied on, he would have realised the so called accepted practice is obsolete and ought not to be used any longer. The article had made the recommendation of change; DW3 has endorsed that it is proper for prior consent from female patients before photographs of them are to be taken. This court does not see the rationale that the first defendant still persists that no consent is required. In any event, taking of photographs is not mandatory or compulsory during the procedure but it is discretionary ie merely to facilitate easy explanation to the patient. Since patient's consent for the conduct of the procedure could be obtained before the procedure is performed, I do not find any valid reason why her consent could not be obtained for the photography at the same time. Even if photographs are absolutely necessary in the circumstances of a particular situation and there is no opportunity to obtain the patient's consent as she is under anaesthesia, patient must still be informed at the first available opportunity for her consent. If consent is refused, then the images taken must be surrendered or destroyed as agreed by her. This was also not done by the first defendant in the instant case.

[14] Learned counsel for the first defendant submitted that the moment the plaintiff had submitted herself to the first defendant to conduct the procedure, there is no longer any right of privacy available to the plaintiff. Such contention is certainly misconceived. The plaintiff had granted her consent for a specific purpose ie for stapler haemorrhoidectomy and nothing else. The first defendant could not do anything beyond that expressed consent. The proposition that there is no longer any right of privacy and the first defendant could do as he pleased is a dangerous proposition which has no basis and ought to be rejected outright.

[15] From all the evidence before this court and on a balance of probabilities, I hold that the first defendant must obtain prior consent from the plaintiff or for that matter from any female patients before he can take photographs of her or their intimate parts of the female's anatomy. Modesty and decency of the female patients must be respected and not violated. A failure to do so constitutes an invasion of the plaintiff's privacy or a breach of the trust and

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A confidence that the plaintiff as patient had reposed on the first defendant as her treating doctor. In the circumstances, I hold that the plaintiff has proved her case against the first defendant.

B [16] Since the second defendant has admitted that it is vicariously liable if the first defendant is held liable to the plaintiff, I will therefore hold that the second defendant is vicariously liable to the plaintiff's claim.

Third issue: Aggravated and/or exemplary damages

C [17] Defence submitted that the plaintiff has not suffered any damage as a result of the said photographs being taken without her consent for reasons that the first defendant has not disseminated the photographs, that the first defendant was the only person who has access to the images and that the first defendant has already had sight of the plaintiff's private part. There was no unauthorised use of the said photographs. The plaintiff submitted that both the defendants have not expressed remorse or regret; the photographs were taken in the circumstances that the plaintiff was unconscious; the plaintiff's feeling of anger, resentment, sadness, disappointment, frustration, humiliation, loss of dignity, anxiety and anguish were not challenged by the defence was aggravated by the refusal of the first defendant to surrender the memory card which contained the images; otherwise had the first defendant surrendered the memory card, this case would not have been brought to court. Learned counsel for the plaintiff suggested a sum of between RM100,000 to RM200,000.

F [18] Aggravated damage is awarded as a form of a higher compensation to show the disapproval of the acts of a defendant which were carried out in such a manner that the plaintiff has suffered more than would normally be expected in such a case; *Tort Law* by Catherine Elliot and Frances Quinn (7th Ed, 2009). In *Rowlands v Chief Constable of Merseyside* [2007] 1 WLR 1065, the Court of Appeal awarded aggravated damages as compensation because Mrs Rowlands' compensatory damages included an amount for psychological injury. The fact of the present case which made the plaintiff feel anger, humiliation, frustration etc is because the first defendant had failed to obtain her prior consent before taking images showing the intimate part of her body coupled with the first defendant's refusal to surrender the memory card which contained the said images to her when she requested for. It is not a case that the first defendant had misused her images in any way as to cause her great pain, shame, humiliation and others ie any psychological injury. I am of the view that the mere feeling of anger, frustration, etc by the plaintiff is the natural consequences of the first defendant's refusal to surrender the memory card containing her images to her. As it is stated in the plaintiff's submission, if only the first defendant had

surrendered the said memory card to her, perhaps, this case would not have come to court. The plaintiff had stated in evidence that because of this incident, she has the fear of undergoing any invasive procedure under sedation as she has come to a point that she is unable to trust any doctors. I do not see the rationale of her perception for simple reason that with this experience, all the most she could easily inform any doctor expressly that she gives no consent for any images to be taken of her. With that express caveat, I do not think any doctor will persist to go against her wish. To qualify for aggravated damages, I am of the view that the acts must be calculated to injure the feelings of the plaintiff. I do not find sufficient evidence to justify aggravated damage to be awarded.

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[19] Exemplary damages serve the purpose of offering a serious punishment to the defendant and to deter others from behaving in the same way. Without going into the categories of exemplary damages as propounded by Lord Devlin in *Rookes v Barnard and others* [1964] AC 1129, the fundamental basis of exemplary damage must first be satisfied by the plaintiff ie the plaintiff has to prove the culpability of the first defendant's conduct which must be so outrageous as to deserve punishment or deterrence. I find the fact that the first defendant had taken the plaintiff's images without her prior consent but had not misused them and the fact that the first defendant refused to surrender the memory card of his digital camera to the plaintiff on ground that it contained other information coupled with the first defendant's offer to delete them in the presence of the plaintiff but was rejected, the first defendant's conduct cannot be construed as so outrageous as to warrant exemplary damages to punish and deter him. The three categories for the award of exemplary damages as laid down by Lord Devlin in *Rookes v Barnard* are (i) where the conduct is calculated to make or to result in a profit; (ii) where there is oppressive conduct by government servants; and (iii) where there is express authorisation by statute. The instant case of the plaintiff does not fall within any of these three categories. Although our courts seem not to follow strictly the three categories of cases as referred to above (see for example, *Tan Kau Tiah @ Tan Ching Hai v Tetuan Teh Kim Teh, Salina & Co (a firm) & Anor* [2010] 3 MLJ 569 (CA); *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352; [1994] 1 CLJ 19), I find that the fact and evidence of the plaintiff's case do not merit exemplary damage to be awarded. Consequently, I hold that exemplary damage is not proved to justify an award.

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CONCLUSION

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[20] For the foregoing reasons, I allow the plaintiff's claim and award nominal damages against the defendants in the sum of RM25,000 with costs of RM10,000. As the memory card containing the two offending photographs has been produced to the court, I order that this memory card is to be destroyed

A by the deputy registrar of this court after the appeal period on a date fixed by the deputy registrar in the presence of the plaintiff and the defendants. With that, I do not find injunction to be necessary.

Plaintiff's claim allowed with costs.

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Reported by Kohila Nesan

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